

# DECISION



## THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

FILE:

B-184664

DATE:

OCT 28 1975

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MATTER OF:

Payment of Overtime Claims of Defense Attache  
Office Civilian Personnel in Saigon

DIGEST:

1. Overtime performed by Defense Attache Office personnel in Saigon during the period of March 30, 1975, through April 30, 1975, immediately prior to the evacuation of American personnel from South Vietnam, was approved by the Defense Attache on June 6, 1975, after the normal procedures for approval and payment of overtime had been modified. The compensation for overtime is mandatory where the work actually performed is officially ordered or approved. See court cases cited.
2. The retroactive modification of a regulation requiring that overtime performed by Defense Attache Office (DAO) civilian personnel be specifically approved by DAO division chiefs or their designated representatives is permissible since the regulation modified was primarily designed to govern internal agency procedures rather than designed to benefit a party by entitling him to either a substantive benefit or procedural safeguard. Accordingly, if Major General Smith is the authorized official to approve the payment of overtime, his approval of June 6, 1975, is sufficient to allow payment of overtime as reported on the time and attendance reports of DAO civilian personnel.
3. 31 U.S.C. § 71, which provides that all claims by and against the Government shall be settled by the General Accounting Office, leaves to the discretion of this Office what evidence is required in support of such claims. See 22 Comp. Gen. 269.
4. Where, due to unusual circumstances, the presentation of the best evidence to support a claim will be impossible, impracticable, or will place an undue burden on the agency or individual concerned, this Office in the exercise of its discretion, will accept such other pertinent data from which the necessary information may be reconstructed, and on this basis, authorize payment.

By letter of July 23, 1975, the Commander of the Navy Accounting and Finance Center requested our decision with respect to the claims of Department of Defense employees from the United States Residual Defense Attache Office (DAO), Saigon, at Fort Shafter, Hawaii, for overtime worked from March 30, 1975, through April 30, 1975, under the extraordinary conditions prevailing during that period in Saigon, Vietnam. Forwarded to us along with the request for our decision is a report of May 1975, sent from the Residual DAO, to the Navy Comptroller, Washington, D.C., which detailed the unusual circumstances prevailing at the DAO, Saigon, during the month of April. The report stated that both United States and LN work forces were to work 7 days a week until further notice in view of the problems arising from the deteriorating military situation in Vietnam and the evacuation of United States and LN employees.

The report also provided that:

"AS CIRCUMSTANCES MAY VARY FOR EACH CLAIM FOR OVERTIME AND CONSIDERING THE FACT THAT AS EACH DAY PASSES IT WILL BECOME MORE DIFFICULT FOR AN INDIVIDUAL TO FACTUALLY SUBSTANTIATE HIS CLAIM, IT IS RECOMMENDED THAT SUCH CLAIMS BE PAID ON THE CERTIFICATION OR SWORN STATEMENT OF THE INDIVIDUAL CONCERNED. \* \* \*"

In May 1975, the following directive regarding the overtime payment of DAO civilian personnel was issued by the Residual DAO Saigon office at Fort Shafter, Hawaii:

"1. DUE TO THE UNUSUAL CIRCUMSTANCES PREVAILING AT DAO SAIGON DURING THE MONTH OF APRIL NORMAL PROCEDURES FOR APPROVAL AND PAYMENT OF OVERTIME ARE HEREBY MODIFIED AS FOLLOWS:

"A. FOR THE TIME PERIOD 30 MARCH THRU 30 APRIL 75 OVERTIME HOURS WORKED BY DAO CIVILIAN EMPLOYEES REMAINING IN VIETNAM AT THE TIME THE OVERTIME WAS WORKED SHOULD BE PAID AS REPORTED ON T & AS. FOR THIS

B-184664

PERIOD, THE REQUIREMENT FOR SPECIFIC APPROVAL BY DAO DIVISION CHIEFS OR THEIR DESIGNATED REPRESENTATIVE OF OVERTIME WORKED HAS BEEN WAIVED."

By order of June 6, 1975, Major General Homer D. Smith, the Defense Attache at the Residual DAO, Saigon, at Fort Shafter, Hawaii, approved the payment of overtime:

"\* \* \* as reported on the T & AS of DAO personnel for the following pay periods:

"30 Mar - 12 Apr

"13 Apr - 26 Apr

"This approval of overtime payment is made in lieu of individual approvals by each of the Div/Ofc Chiefs of the DAO Command Group."

We have been asked to decide whether the overtime approval of Major General Smith is sufficient to permit payment of the uncertified overtime worked. We note that the statute governing the payment of overtime, 5 U.S.C. § 5542, and the implementing regulations, 5 C.F.R. § 550.111 and chapter 550, subchapter 1-3, FPM, February 28, 1973, make the payment of overtime actually worked mandatory where officially ordered or approved. See Rapp v. United States, 167 Ct. Cl. 852 (1964); Anderson v. United States, 136 Ct. Cl. 365 (1956).

In the instant case, the Residual DAO modified the normal procedures for the approval and payment of overtime by waiving the requirement for specific approval by DAO division chiefs or their designated representatives of overtime worked. Since the regulation modified was primarily designed to govern internal agency procedures rather than designed to benefit a party by entitling him to either a substantive benefit or procedural safeguard, it appears that the retroactive modification of the requirement of specific approval by DAO division chiefs or their designated representatives falls within the general principle cited in American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970), that "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it \* \* \*" NLRB v. Monsanto Chemical Co.,

B-184664

205 F.2d 763, 764 \* \* \*." See Starzec v. United States, 145 Ct. Cl. 25 (1959). In light of the modified procedures, if Major General Smith is the authorized official to approve overtime, his June 6, 1975 approval of overtime as reported on the time and attendance reports of DAO personnel is sufficient.

A more serious problem, however, concerns the quantum of evidentiary support which should accompany each claim for overtime before the claim may be properly certified for payment. In a somewhat similar situation involving a claim for arrears of military pay of an officer who died in combat conditions prior to the fall of the Philippines to the Japanese in World War II which resulted in the loss of the military and disbursing records necessary to accurately adjust the claim, we recognized that under our statutory authority to settle and adjust claims brought against the Government, 31 U.S.C. § 71, we may exercise our discretion as to what evidence shall be the basis for the allowance of a particular claim. 22 Comp. Gen. 269 (1942). We have as a general rule required that all claims against the Government be supported by the best evidence obtainable. Nonetheless, we are cognizant of the fact that certain situations will inevitably arise where the presentation of the best evidence will be impossible, impracticable, or will place an undue burden on the agency or individual concerned, and, consequently, we have exercised our discretion in establishing the quantum of evidentiary support necessary to certify a claim.

In accordance with this principle, we have for example accepted a claimant's diaries to establish that the claimant did continuously perform overtime work throughout the entire period of his claim including those periods not supported by personal records. B-134038, May 23, 1968, B-164050, January 15, 1970. Furthermore, we have accepted the "certificates" of two supervisors of a claimant to establish that the standard work program at the claimant's duty stations consisted of 48-hour workweeks and consequently to conclude that claimant performed compensable services consisting of 48 hours a week. The common denominator of all these decisions is that while a settlement of a claim by our Office must be predicated (if at all possible) upon official records, we will, where the circumstances so warrant, accept other pertinent data from which the necessary information may reasonably be reconstructed. B-134038, May 23, 1968.

B-184664

We are not unmindful of the personal sacrifices which the DAO personnel at Saigon have made during the period in question. Nor are we forgetful of the congressional directive that overtime worked by an employee where ordered or approved by a responsible and authorized official must be compensated. However, we may not in derogation of our statutory duties sanction the payment of claims of doubtful validity due to the lack of either official records or suitable evidence from which the amount of overtime may reasonably be reconstructed. Nevertheless, in light of the extraordinary circumstances prevailing in Saigon during this period, we believe that the time and attendance reports contemporaneously maintained plus such other pertinent records from which the amount of overtime claimed may be reasonably approximated will adequately protect the Government's interest, and the claims may be allowed in such amount as may be found due. We wish to emphasize that this decision in no way modifies existing procedures for the review and allowance of claims, but merely indicates the acceptable limit to which the Navy Accounting and Finance Center may proceed in certifying these claims for payment.

Accordingly, upon receipt of each claim for payment of overtime, and prior to certification, it is the duty of the certifying officer to review each claim supported by time and attendance reports as to the reasonableness of the amount of overtime claimed, considering whatever supporting information is available along with the appropriate regulations and cases. If the certifying officer should have reasonable doubts as to the amount of overtime actually worked, he may require such supporting evidence as is consonant with this decision prior to certification of the claim. In the event that the certifying officer remains unsatisfied with the claim, the matter may be submitted on an individual case basis to our Transportation and Claims Division as a doubtful claim.

R.F.KELLER

Deputy, Comptroller General  
of the United States